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SUBJECT: COMMUNICATION FROM UN SPECIAL RAPPORTEUR ON EXTRAJUDICIAL,
SUMMARY OR ARBITRARY EXECUTIONS

¶1. (U) Mission has received a communication from the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, dated September 12, 2008. This communication has been sent via e-mail to IO/RHS.

¶2. (U) Begin text of letter:

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 8/3.

In this connection, I would like to draw the attention of your Government to information I have received regarding Troy Anthony Davis who has been sentenced to death and is reportedly scheduled to be executed on 23 September 2008. Mr Davis was sentenced to death in 1991 for the August 1989 killing of Mark Allen McPhail, a security officer (and off-duty police officer) in Savannah, Georgia. It is my understanding that a clemency hearing before the state Board of Pardons and Paroles is scheduled to take place today, 12 September ¶2008.

In recent years, Mr. Davis' defense has made numerous unsuccessful attempts to obtain a hearing to present post-conviction evidence, including affidavits from the seven out of nine non-police witnesses who have recanted or changed their testimony subsequent to the conviction. In 2007, a Georgia trial-level judge dismissed Mr. Davis' appeal for a new trial without conducting a hearing. On 17 March 2008, the Georgia Supreme Court ruled on the appeal against this decision. In a 4-3 ruling, it decided that the lower court had not abused its discretion.

The Chief Justice of the Georgia Supreme Court authored the dissenting opinion. She noted that "nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably". Most importantly from the perspective of international law, the Chief Justice argued that "this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death."

Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), to which the United States of America is a party, provides "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." On the one hand, there can be no doubt that - from a formal point of view - this right is protected to an exemplary degree in the United States, as illustrated by the innumerable instances of appeal at the State and Federal level the case of Mr. Davis has gone through in the seventeen years since his conviction. On the other hand, however, Article 14(5) ICCPR requires that a review by a higher court must be a genuine review of the issues in the case, an "overly rigid [approach which] fails to allow an adequate inquiry into the fundamental question" (in the words of the Georgia Chief Justice) cannot live up to that standard. In the context of Mr. Davis' case, the refusal by the courts to grant a rehearing when presented with significant new evidence which casts doubt on the initial conviction appears to amount to a denial of the right to a genuine review as required.

Such a genuine review would be particularly appropriate in this case in the light of information regarding the alleged failure of trial counsel to conduct an adequate investigation of the state's evidence, to which I drew your Government's attention in a previous communication regarding this case dated 16 July 2007. I also noted that the Georgia Resource Center, a post-conviction defender organization (PCDO) which represented Mr. Davis, reportedly had its budget reduced by two-thirds and the number of lawyers on its staff reduced from eight to two at the time it was engaged in Mr. Davis' defense. A lawyer working on Troy Davis' case stated in an affidavit that "I desperately tried to represent Mr. Davis during this period, but the lack of adequate resources and the numerous intervening crises made that impossible, we were simply trying to avert total disaster rather than provide any kind of active or effective representation".

International law requires Governments to provide a defendant accused of a serious crime with legal counsel without payment by him if he does not have sufficient means to pay for it (Article 14(3)(d) ICCPR). Where such public defense is provided to an indigent defendant, it must live up to the requirement that the accused shall have "adequate time and facilities for the preparation of his defense" (Article 14(3)(b) ICCPR). As stated by the UN Human Rights Committee, "[w]hen an accused is represented by assigned counsel, the authorities [...] have a special duty to take measures to ensure that the accused is effectively represented (Kelly v. Jamaica (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 248, para. 5.10)." In the present case there are grounds for concern that poor legal representation afforded to Mr. Davis since 1989 has denied him both the right to a fair trial and the right to effectively appeal against conviction and the death sentence. In light of these serious and pressing concerns, based upon human rights norms recognized by the international community, I would respectfully request Your Excellency's Government to take all necessary steps to avoid executions that would be inconsistent with accepted standards of international human rights law. I urge your Excellency's Government to put Mr. Davis execution on hold in light of the above facts with a view to commuting his death sentence. In closing I wish to reiterate two points. The first is that, despite receiving a significant number of complaints in relation to the carrying out of the death sentence in the United States, I have only rarely acted on these complaints. In this instance I firmly believe that the case merits this urgent appeal and warrants immediate action on the part of the U.S. Government. The second is that I take no position either for or against the death penalty but act only when it seems clear that the risk of injustice is such that internationally accepted standards will be violated in the absence of urgent intervention by the Government.

Since I am expected to report on this case to the UN Human Rights Council, I would be grateful for your cooperation and your observations. In addition to an expeditious first reply, I would greatly appreciate being informed about further developments in this case. I undertake to ensure that your Government's response is accurately reflected in the report I will submit to the UN Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Philip Alston Special Rapporteur on extrajudicial, summary or arbitrary executions

End Text

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